IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARIA BALLAS, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF READING, et al.	:	NO. 00-CV-2943

MEMORANDUM

Padova, J. **January , 2001**

Before the Court is Defendants' Motion to Dismiss. The matter has been fully briefed and is ripe for decision. For the reasons that follow, the Court grants in part and denies in part Defendants' Motion.

I. BACKGROUND

Plaintiff Maria Ballas ("Ballas") brings suit alleging retaliatory termination and wrongful refusal to permit her to repurchase her rights under a pension fund designed for employees of the City of Reading. According to the Amended Complaint, Ballas worked as purchasing manager of the City of Reading ("City") from 1974 to 1980, when she left for private employment. During this period of employment, Ballas participated in the City's pension plan ("Pension Plan") administered by Barbara Adams ("Adams") and the City of Reading Officers and Employees Pension Board ("Board"). Upon her resignation in 1980, the Board disbursed $4,263.43 in past contributions to Ballas. The City later rehired Ballas as purchasing manager in 1987. When she returned to City employment, Ballas attempted to invest $10,000 in the Pension Plan by repurchasing her pension rights for the time of her former employment with the City. Adams and the Board denied this

request to invest. Subsequently, Ballas again sought to repurchase her pension rights. The Board discussed her request at two public meetings in February and March, 2000. At the later meeting, the Pension Board allegedly discussed a legal opinion prepared by its solicitor regarding Ballas' request and voted to deny her request. Because Adams later refused to provide Ballas with a copy of the minutes of the meeting and the solicitor's legal opinion, Ballas alleges that she was improperly denied her right to participate in the Pension Plan without due process.

Ballas' husband, S. Henry Lessig ("Lessig") was also involved in local politics as a member of the City Planning Commission and the Solid Waste Collection Task Force. Ballas and Lessig both supported comprehensive trash collection in the City of Reading prior to and on January 3, 2000, the date on which Joseph Eppihimer ("Mayor" or "Eppihimer") assumed the office of City Mayor. Ballas alleges that Eppihimer, who opposed comprehensive trash collection, immediately began a campaign of retaliation against supporters of comprehensive trash collection including she and her husband. Eppihimer and Jesus Pena ("Pena"), City Director of Human Resources, terminated Ballas on April 28, 2000. Ballas claims that her termination was effected without notice, cause, or an opportunity for a hearing, and through procedures that contravene those set forth in the Charter of the City of Reading ("City Charter").

On June 9, 2000, Plaintiffs initiated the instant suit against the City, Eppihimer, the City Council of Reading, Paul Hoh, President of the City Council, several members of the City Council,[1] Pena, Adams, and the Pension Board. The original Complaint stated sixteen counts against Defendants. Plaintiffs subsequently filed an Amended Complaint on September 27, 2000, that

[1]These members are Vincent Galiardo, Jr., Casey Ganster, Vaughn Spencer, and Jeffrey Waltman.

dropped Paul Hoh and the individual members of the City Council as Defendants and reduced the number of counts.

The Amended Complaint contains eleven counts. The first four counts are brought pursuant to 42 U.S.C. § 1983. Count I alleges that Defendants wrongfully deprived Ballas of her employment in violation of the Fourteenth Amendment of the United States Constitution. Both Ballas and Lessig assert Count II, alleging that Defendants wrongfully terminated Ballas in retaliation for her speech opposing comprehensive trash collection in violation of her rights under the First Amendment. Ballas asserts in Count III that Defendants violated her right to due process under the Fourteenth Amendment by terminating her without following the procedures outlined in the City Charter. Count IV alleges that the Pension Board's refusal to permit her to repurchase her rights under the Pension Plan violated her due process rights. Plaintiffs do not specify against which Defendants these section 1983 counts are asserted. Based on the allegations, however, the Court assumes that Counts I - III are against the City, City Council, Pena and Mayor Eppihimer, and Count IV is against Adams and the Pension Board. Counts V through IX allege wrongful termination pursuant to the City Charter. Lessig asserts a cause of action for loss of consortium in Count X. Count XI seeks an injunction ordering Defendants to reinstate Ballas to her position of purchasing manager.

II. LEGAL STANDARD

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.

III. DISCUSSION

Defendants now seek dismissal of Counts I and III - X of the Amended Complaint, all claims against City Council, Pena, Adams, and the Pension Board, and all claims by Lessig. The Court will address each argument in turn.

A. Counts I and III: Protectable Interest under Fourteenth Amendment

Section 1983 of Title 42 of the United States Code provides a remedy against any person who, under the color of law, deprives another of his constitutional rights. 42 U.S.C. § 1983 (1994). To establish a claim under § 1983, a plaintiff must allege (1) a deprivation of a federally protected right, and (2) commission of the deprivation by one acting under color of state law. Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997). In Counts I and III, Ballas alleges deprivation of her rights under the Fourteenth Amendment. The Fourteenth Amendment to the United States Constitution protects a person from state action that deprives her of life, liberty or property without due process of law. U.S. Const. am. XIV. While on its face this constitutional provision speaks to the adequacy of state procedures, the Supreme Court has held that the clause also has a substantive component. Nicholas v. Pa. State Univ., 227 F.3d 133, 138 (3d Cir. 2000) (citing Planned Parenthood of S.E. Pa v. Casey, 505 U.S. 833, 846-47 (1992)). With respect to Count I, Ballas seeks relief under both the procedural and substantive prongs of the Fourteenth Amendment. With respect to Count III, Ballas asserts only a violation of her right to procedural due process. The Court will address each prong in turn.

1. Procedural Due Process

The essential principle of procedural due process is that a deprivation of life, liberty or property should be preceded by "notice and opportunity for a hearing appropriate to the nature of the case." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985). For procedural due process

to apply, the plaintiff must establish a property interest in her employment. Poteat v. Harrisburg Sch. Dist., 33 F. Supp. 2d 384, 390 (M.D. Pa. 1999) (citing Abbott v. Latshaw, 164 F.3d 141, 146 (3d Cir. 1998)). Well-established federal law recognizes the existence of a property interest in public employment where state law supports a claim of entitlement to continued employment. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1077 (3d Cir. 1990). State law restricting discharge of a public employee except 'for cause' supports such an entitlement to continued employment and thereby creates a protectable property interest. See Gilbert v. Homar, 520 U.S. 924, 928-29 (1997); Bradley, 913 F.2d at 1077. Defendants argue that Plaintiff lacks a property interest in her employment.

As a rule, municipal employees in Pennsylvania are at-will employees. See Pa. Const. Art. VI, § 7; Cooley v. Pa. Housing Finance Agency, 830 F.2d 469, 471 (3d Cir. 1987), abrogated on other grounds by Foster v. Chesapeake Ins. Co., 933 F.2d 1207 (3d Cir.1991); Stumpp v. Stroudsburg Muni. Auth., 658 A.2d 333, 334 (Pa. 1995). Municipal employees, therefore, assume their job subject to the possibility of summary removal by the employing authority for any reason or no reason. Cooley, 830 F.2d at 471; Scott v. Philadelphia Parking Auth., 166 A.2d 278, 280 (Pa. 1961). At-will employees can demonstrate a property interest in retaining their jobs only by showing an enforceable expectation of continued employment, or some guarantee of continued employment extended by the employing municipality. Shoemaker v. City of Lock Haven, 906 F. Supp. 230, 233 (M.D. Pa. 1995). The plaintiff has the burden of proving that she was not an at-will employee. Lynch v. Borough of Ambler, No. Civ. A. 94-6401, 1996 WL 283643, at *11 n. 10 (May 29, 1996) (citing Rutherford v. Presbyterian-Univ. Hosp., 612 A.2d 500, 503 (Pa. Super. Ct. 1992)).

For a public employee to claim a property interest in public employment in Pennsylvania, the

hiring agency must have the specific statutory authority to create that interest. Cooley, 830 F.2d at 471; Demko v. Luzerne County Cmty Coll., 113 F. Supp. 2d 722, 729 (M.D. Pa. 2000); Stumpp, 658 A.2d at 334; Scott, 166 A.2d at 282. Where a state agency or municipality contracts for tenured employment in the absence of enabling legislation, the contract is invalid and unenforceable. Scott, 166 A.2d at 282. The enabling legislation must contain a specific and explicit statement of the public agency's power to contract for tenured employment in order to create a property interest in public employment. Scott, 166 A.2d at 157; see also Cooley, 830 F.2d at 471; Demko, 113 F. Supp. 2d at 729-30; Shoemaker, 906 F. Supp. at 234. General grants of power such as for the power "necessary and convenient to carry out the purposes of the [municipality], [or] . . . to make contracts of every name and nature" are insufficient to permit a public employer to contract away the right of summary dismissal. Scott, 166 A.2d at 282; see also Cooley, 830 F.2d at 471; Shoemaker, 906 F. Supp. at 234. Rather, the legislature must confer tenure as an integral part of a comprehensive governmental employment scheme and use explicit language to indicate permission to confer tenure. Scott, 166 A.2d at 281. Such specificity is required because the power to summarily dismiss is "fundamental to a scheme of good government." Scott, 166 A.2d at 282.

An example of a sufficiently specific grant of authority is contained in the Civil Service Act, 71 Pa. Cons. Stat. § 741.1 - 741.1005. Cooley, 830 F.2d at 471 n.1; Shoemaker, 906 F. Supp. at 234; Scott, 166 A.2d at 281-82. The Civil Service Act creates a classified service that includes various positions from specifically listed agencies and explicitly proscribes removal of employees in the classified service "except for just cause." See 71 Pa. Cons. Stat. Ann. §§ 741.3(d), 741.807 (2000).

Similarly, the Public Employees Relations Act,[2] and the teachers tenure provisions of the Public School Code of 1949[3] as amended contain specific and explicit grants of power permitting public entities to confer tenure to their employees. Shoemaker, 906 F. Supp. at 234; Scott, 166 A.2d at 281; Bolduc v. Bd. of Supervisors of Lower Paxton Township, 618 A.2d 1188, 1190 (Pa. Commw. Ct. 1992).

Ballas contends that the merit personnel system enacted by the City Council and the personnel code in the City Charter create a protectable property right in her employment. The City Charter establishes a merit personnel system that "require[s] that all personnel decisions be made solely on the basis of merit and qualifications, applicable to all employees." (Am. Compl. Ex. A. § 702(c).) The merit system states:

> Any appointment, promotion, transfer, demotion, suspension, dismissal, or disciplinary action shall be carried out in accordance with the merit personnel system.

(Id.) The City Charter further requires adoption of a personnel code, the goal of which is "to provide for merit selection for all applicable positions" and that outlines procedures for enforcement of the merit personnel system. (Id. § 703.) Ballas alleges that the City Council enacted a personnel code

---

[2]This statute addresses the rights of public employees to organize and engage in collective bargaining with their employing agency. See 43 Pa. Cons. Stat. § 1101.101 (2000). It explicitly provides: "[n]othing contained in this act shall impair the employer's right to hire employes [sic] or to discharge employes [sic] for just cause consistent with existing legislation." 43 Pa. Cons. Stat. § 1101.706 (2000). Pennsylvania courts interpret this provision to permit public agencies to enter into collective bargaining agreements to limit its power to summarily dismiss members of a bargaining unit. See Demko, 113 F. Supp. 2d at 732-33; Bolduc, 618 A.2d at 1191.

[3]This statute requires school districts to enter into contracts with professional employees who have completed a certain number of years of service for unlimited terms of employment, and specifies that such employees may be terminated only for specifically-listed causes. See 24 Pa. Cons. Stat. §§ 11-1121, 11-1122 (2000).

that provides for discipline for "just cause" and termination of employment when the employee's "performance as a result of an unfavorable performance evaluation, or conduct fall below the required job standards for City employees." (Am. Compl. Ex. E § 7.14.) According to Ballas, the City Charter and personnel code permit termination or discipline only for cause. For Ballas' theory to be viable, the Pennsylvania state legislature must have conveyed to the City of Reading by statute the power to confer tenured employment to its employees. Otherwise, any contracts or ordinances creating tenured employment would be void and unenforceable. To decide the validity of any ordinances or codes enacted by the City Council conveying tenured employment, the Court must examine the powers granted to the City of Reading by state statute. See Bolduc, 618 A.2d at 1190.

The Amended Complaint alleges that the City of Reading is a city of the third class. (See Am. Compl. ¶ 10.) The general provisions of the Pennsylvania Third Class City Code grants to the city council the "power of appointment and dismissal of all city officers and employes [sic] other than elected officers and shall provide for the removal of officers of the city whose offices are established by ordinance, except where otherwise provided by this act." 53 Pa. Cons. Stat. § 35901 (2000). The Court located only one provision in the Third Class City Code that conveys tenured employment. See 53 Pa. Cons. Stat. § 39407 (2000). The Third Class City Code only provides persons appointed to positions in the police, engineering, or electrical departments, or persons in the positions of building inspectors, health officers, sanitary policemen, or inspectors of the health department with tenured employment. See 53 Pa. Cons. Stat. §§ 39401, 39407 (2000). As a purchasing manager in the City finance department, this provision is inapplicable to Ballas.

According to the Amended Complaint, the City of Reading enacted a City Charter under the Optional Third Class City Charter Law ("City Charter Law"), 53 Pa. Const. Stat. § 41101. Article

III of the City Charter Law provides:

> Each city governed by an option form of government pursuant to this act shall, subject to the provisions of and limitations prescribed by this act, have full power to:
> [o]rganize and regulate its internal affairs, and to establish, alter, and abolish offices, positions and employments and to define the functions, powers and duties thereof and fix their term, tenure and compensation.

53 Pa. Cons. Stat. § 41303 (2000). The City Charter Law further states that the legislature intended to confer the greatest power of local self-government consistent with the Pennsylvania Constitution through the general grant of municipal power and requires all grants of municipal power be liberally construed in favor of the city. 53 Pa. Cons. Stat. § 41304 (2000). The law, however, next limits the broad powers granted by preceding sections:

> Notwithstanding the grant of powers contained in this act, no city shall exercise powers contrary to or in limitation or enlargement of powers granted to the city by acts of the General Assembly which are:
> (1) Applicable to a class or classes of cities on the following subjects:
> . . .
> (x) Relating to civil service.
> . . .
> (2) Applicable in every part of the Commonwealth.
> (3) Applicable to all the cities of the Commonwealth.

53 Pa. Cons. Stat. § 41305 (2000).

Courts have interpreted general grants of authority 'to fix the term, tenure and compensation of offices and employments' similar to that stated in 53 Pa. Cons. Stat. § 41303 to be insufficient to confer the right to contract away the right of summary dismissal. See Shoemaker, 906 F. Supp. at 235. Comparing section 41303 with those Pennsylvania statutes that courts have accepted as conveying the power of tenured public employment confirms this interpretation. Furthermore, the statute's prohibition against city ordinances regulating civil service matters that are contrary to, in

limitation of, or enlargement of the granted powers conflicts with the application of the merit personnel system or personnel code to employees who are not appointed to civil service pursuant to 53 Pa. Cons. Stat. §§ 39401, 39407. See 53 Pa. Cons. Stat. §§ 41305, 36006 (2000); see also Shoemaker, 906 F. Supp. at 235 ("Further, the section 305 prohibition against city ordinances regulating "civil service" matters would appear to conflict with an employment agreement guaranteeing employment for a time certain."). Having determined that the general grant of authority in section 41303 is insufficient to confer the right to establish tenured positions, the Court concludes the City of Reading had no statutory authority to create tenured public employment for appointed employees outside of those specifically named in section 39401. Since she was not appointed to a position in one of the departments named in section 39401, Ballas lacks a property interest in her employment.

The Court rejects Ballas' reliance on In re Addison, 122 A.2d 272 (Pa.1956) for the proposition that city charters constitute legislation that trump state statutes with reference to the discharge of city employees.[4] Addison arose under entirely different circumstances than the instant case. Addison involved the scope of judicial review of an employment decision, not the city's fundamental power to provide tenure or the existence of a property interest in public employment. More importantly, the City of Philadelphia was required under its enabling statute to convey tenured

[4]Addison involved the discharge of a Philadelphia police officer by the police commissioner for conduct unbecoming an officer. Addison, 122 A.2d at 272. In dicta, the Pennsylvania Supreme Court stated that a municipal ordinance prohibiting appeal on the merits of a termination decision to state courts constituted legislation with the same force and effect as a state statute that permitted such an appeal. Id. at 275. The court reasoned that the city ordinance trumped the state statute in part because the removal of a civil servant is a matter of purely local concern. Id. Ballas claims that this principle compels enforcement of the City Charter's merit personnel system.

employment to persons employed in its police force. Philadelphia is classified as a first class city under Pennsylvania law. See Philadelphia Eagles Football Club, Inc. v. City of Philadelphia, 758 A.2d 236, 243 (Pa. Commw. Ct. 2000). The enabling statute applicable to first class cities prohibits the removal or suspension of persons employed in the police force except for specified cause. See 53 Pa. Cons. Stat. § 55644 (2000). No such statutory authority exists for the City of Reading as a third class city.[5] In light of more recent Pennsylvania Supreme Court cases that clearly state that municipalities may not confer tenured employment without clear enabling legislation, the Addison court's pronouncements are not applicable to Ballas' case. See Stumpp, 658 A.2d at 335; Scott, 166 A.2d at 281.

In summary, the Court concludes that Ballas lacks a property interest in her employment. Accordingly, Count III is dismissed.

2. Substantive Due Process

Substantive due process may apply when a plaintiff challenges the arbitrary exercise of power by a government official through a non-legislative act. Nicholas, 227 F.3d at 139. Generally, the state may not take away a property interest that falls within the scope of substantive due process for reasons that are "arbitrary, irrational, or tainted by improper motive," or by means so egregious as to "shock the conscience." Id. (quotations omitted). To prevail on such a substantive due process

[5]The Court rejects Ballas' reliance on Delliponti v. DeAngelis, 681 A.2d 1261 (Pa. 1996) for similar reasons. The plaintiff in that case appealed her discharge from the position of administrative assistant to the chief of police in the Borough of Norristown. Delliponti, 681 A.2d at 1262. The Pennsylvania Supreme Court held that she had a property right in her employment and accordingly was entitled to a termination hearing pursuant to the Norristown charter. Id. at 1264. Pursuant to Pennsylvania statute, however, a borough may not remove "any person employed in the police force" absent just cause. 53 Pa. Cons. Stat. § 46190 (2000). Furthermore, the result is contrary to the longstanding principle outlined by the Pennsylvania Supreme Court in prior cases. See Stumpp, 658 A.2d at 335.

claim, a plaintiff must establish possession of a protected property interest to which the Fourteenth Amendment's due process protection applies. Id. at 139-40 (citing Woodwind Estates Ltd. v. Gretkowski, 205 F.3d 118, 123 (3d Cir. 2000)). Since Ballas lacks a property interest in her employment protectable under the Fourteenth Amendment procedural due process prong, Ballas may not assert a substantive due process violation.[6] Accordingly, the Court dismisses Count I.

B. Count II - Lessig's Claim Regarding Ballas' Termination

Both Ballas and Lessig advance Count II under section 1983 for terminating Ballas in violation of their First Amendment rights. Defendants argue that Lessig lacks standing to assert this claim. The Court agrees.

Courts apply a three-step, burden-shifting analysis for retaliation claims made pursuant to the First Amendment under § 1983. Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir.

---

[6]Even if Ballas had a property interest in her job protectable by procedural due process, the Court would nonetheless conclude that she lacks a property interest protectable under substantive due process. "Not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." Nicholas, 227 F.3d at 139 (quoting Reich v. Beharry, 833 F.2d 239, 243 (3d Cir. 1989)). Rather, successful claims under substantive due process require deprivation of a property interest that is fundamental under the United States Constitution. Id. at 142. Fundamental property interests are those that are "deeply rooted in the Nation's history and traditions," or are "implicit in the concept of ordered liberty like personal choice in matters of marriage and family." Id. at 143. Property interests created by entitlements under state law, however, are insufficient to be deemed fundamental. See id. at 140-42. Because it is a state-created contractual right, the Third Circuit Court of Appeals held that a property interest in public employment is not fundamental and accordingly is not entitled to substantive due process protection. Id. at 142.

The Court rejects Ballas' contention that her claim is permissible under Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). Loudermill addressed the process due a public employee with a property interest in his job and held that the federal constitution requires a pre-termination opportunity to respond to the charges made coupled with a comprehensive post-termination hearing. Gilbert v. Homar, 520 U.S. 924, 929 (1997); Loudermill, 470 U.S. at 547-48. Loudermill did not purport to address any claim of substantive due process, but rather addressed the procedural due process requirement of a hearing or specific procedures.

1995). First, the plaintiff must show that he engaged in conduct or speech that is protected by the First Amendment. Id. Second, the plaintiff must show that the defendant responded with retaliation, and that the protected activity was a substantial or motivating factor in the alleged retaliatory action. Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997); Watters, 55 F.3d at 892. Third, the defendant may defeat the plaintiff's claim by demonstrating by a preponderance of the evidence that the same action would have been taken even in the absence of the protected conduct. Watters, 55 F.3d at 892.

Reviewing the allegations in the Amended Complaint and assuming that Lessig's speech against comprehensive trash collection was protectable under the First Amendment, the Court concludes that Lessig fails to allege retaliatory conduct. Section 1983 permits suit for the abridgment only of one's own constitutional rights. See e.g. Berry v. City of Muskogee, 900 F.2d 1489, 1506 (10th Cir.1990). Lessig lacks standing to sue based on action taken against his wife, except through some derivative theory of liability like loss of consortium. Claims for loss of consortium, however, are not cognizable under section 1983. See Berry, 900 F.2d at 1506-07 (plaintiffs not entitled to loss of consortium damages because section 1983 creates a federal remedy only for the party injured); Stallworth v. City of Cleveland, 893 F.2d 830, 838 (6th Cir.1990) (dismissing husband's request for recovery for loss of consortium under section 1983 claim because the wife, rather than her husband, was the one who had suffered a deprivation of her civil rights); Quitmeyer v. Southeastern Pa. Trans. Auth., 740 F. Supp. 363, 370 (E.D. Pa.1990) (holding no authority to consider a loss of consortium claim deriving from a claim of injury by a spouse brought pursuant to 42 U.S.C. § 1983).

The only retaliation against Lessig alleged in the Amended Complaint is Mayor Eppihimer's vote in City Council against Lessig's reappointment to the City Planning Commission. (Am. Compl. ¶ 74.) This is insufficient to constitute actionable retaliation. Lessig was not terminated, demoted,

transferred, or denied any employment benefit based on his speech. See Rutan v. Republican Party of Illinois, 497 U.S. 62, 75 (1990) (holding that the First Amendment prevents retaliation by termination, as well as the dispensation of promotions, transfers, and rehires); Anderson, 125 F.3d at 163 (holding that a plaintiff may establish a retaliation claim under the First Amendment if he was "denied a benefit simply because he exercised his First Amendment rights."). Accordingly, Count II as brought by Lessig is dismissed.

C. Count IV: Denial of Pension Repurchase

Count IV is brought pursuant to § 1983 and alleges that the Pension Board's refusal to permit her to repurchase her rights under the Pension Plan violated her due process rights under the Fourteenth Amendment.[7] Ballas alleges that she has rights to a pension under Pennsylvania law, 43 Pa. Cons. Stat. § 39344, and that a City ordinance permits employees who leave public employment and later return may contribute to their pension for the prior years of service. (Am. Compl. ¶ 94-95.) The Amended Complaint states that Ballas presented a check for $10,000.00 to Adams to invest in the pension plan for the years when she was previously employed by the City and including interest that would have accrued. (Id. ¶ 55.) The Pension Board met in February 2000, and invited Ballas to attend the meeting. (Id. ¶ 56.) The Pension Board met again on March 15, 2000, a public meeting that Ballas admits she could have attended. (Id.) At the March meeting, the Pension Board circulated and discussed a legal opinion prepared by its solicitor, and voted to deny Ballas' request. (Id.) Ballas subsequently wrote to Adams requesting the minutes of the meeting and a copy of the solicitor's opinion. (Id. ¶ 59(a).) Adams denied Ballas' request. (Id.) In essence, Ballas claims that the Pension

[7]Ballas fails to identify the specific Defendants to whom this count is applicable, but based on the allegations, the Court presumes she is suing the City, the Pension Board, and Barbara Adams.

Board's refusal to produce the legal opinion upon which it allegedly relied to deny her request constitutes a violation of her due process rights. (Id. ¶¶ 97-98.)

At the threshold, the Court rejects Defendants' assertion that Count IV is barred by the statute of limitations. The parties agree that § 1983 actions apply the state's statute of limitations for personal injury actions, which in Pennsylvania is two years. See Montgomery v. De Simone, 159 F.3d 120, 126 n.4 (3d Cir. 1998). Federal law governs the accrual of §1983 claims. Id. at 126. Under federal law, "the limitations period begins to run from the time when the plaintiff knows or has reason to know of the injury which is the basis of the section 1983 action." Id. (quoting Gently v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir.1991)). Ballas' cause of action arose in March 2000, when her request to repurchase her pension benefits was denied. This action was filed on June 9, 2000, well within the applicable statute of limitations.

Assuming that Ballas has a property interest in participating in the Pension Plan, the Court concludes that Ballas is unable to establish a deprivation of due process under the allegations in the Amended Complaint. Due process requires that a deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case, and the opportunity to be heard must be at a meaningful time and in a meaningful manner." Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991) (citing Loudermill, 470 U.S. at 542). Plaintiff points to, and the Court's independent research reveals, no caselaw indicating that a decisional body is required to turn over every document considered in an administrative adjudication. In cases involving administrative decisions, the Third Circuit has held that due process concerns are satisfied where the state provides for a hearing with notice and opportunity to present evidence and argument, and judicial review. Midnight Sessions, 945 F.2d at 680. The Amended Complaint states that the

Pension Board had a public meeting of which Ballas had advance notice and at which the legal opinion was circulated and discussed. (Am. Compl. ¶ 57(a).) Ballas admits that she did not attend the meeting. The Court fails to see any deprivation of Ballas' procedural due process rights based on these allegations. Accordingly, Count IV is dismissed.[8]

D. Qualified Immunity

Defendant Pena asserts qualified immunity to Counts I, II, and III. Government officials have qualified immunity from suit under Section 1983 so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The defendant has the burden of pleading and proving qualified immunity. Harlow, 457 U.S. at 815.

When resolving issues of qualified immunity, a court must first determine whether the plaintiff has alleged a deprivation of a constitutional right. Torres v. McLaughlin, 163 F.3d 169, 172 (3d Cir.1998) (internal citations omitted). Only after satisfying that inquiry should the court then ask whether the right allegedly implicated was clearly established at the time of the events in question. Id. To be clearly established, the contours of the right must be sufficiently clear such that a reasonable official would understand that what he is doing violates that right. Karnes v. Skrutski, 62 F.3d 485, 492 (3d Cir. 1995). The Court concludes that Pena is not entitled to dismissal on the basis

[8]Having reached this conclusion, the Court declines to address Defendants' alternative arguments.

of qualified immunity on Count II.[9] Pena has not challenged the adequacy of Ballas' allegations of a deprivation of a constitutional right with respect to Count II and an examination of the Amended Complaint's allegations, assuming their truth, reveals that Ballas has alleged a deprivation of her constitutional rights under the First Amendment under the standard outlined in Watters, 55 F.3d at 892. Furthermore, Ballas' right not to suffer termination in retaliation for exercise of his First Amendment rights was clearly established at the time of her discharge in April, 2000. See Rutan, 497 U.S. at 75; Gray v. York Newspapers, Inc., 957 F.2d 1070, 1086 (3d Cir. 1992). The salient question, therefore, is whether Pena's conduct was objectively reasonable in light of pre-existing law as measured by the amount of knowledge available to the officer at the time of the alleged violation. Anderson v. Creighton, 493 U.S. 635, 649 (1987); Giuffre v. Bissell, 31 F.3d 1241, 1252 (3d Cir. 1994). At this early stage, the Court lacks sufficient evidence to conclude that Pena acted in an objectively reasonable fashion. Pena, therefore, is not entitled at this time to dismissal of Count II on the basis of qualified immunity.

E. Counts V - X: State Law Claims

Counts V and VI allege that Defendants wrongfully terminated Ballas in violation of the City Charter sections 603, and 702's merit personnel system respectively. Count VII alleges wrongful termination in violation of City Charter sections 406, 603, and 701, as well as in violation of Pennsylvania's public policy against retaliation for political views. Count VIII is a claim for retaliatory discharge based on Ballas' support of comprehensive trash collection. Count IX alleges intentional termination in violation of the City Charter. Lessig advances Count X for loss of

[9]Having already concluded that Counts I and III fail to allege constitutional deprivations, the Court need not address the issue of qualified immunity with respect to those counts.

consortium. Although none of the counts specify against which Defendant they are directed, because all of the counts relate to her alleged unlawful termination, the Court assumes that Ballas asserts Counts V - X against the City, Mayor Eppihimer, City Council, and Pena.[10] Defendants assert immunity for these claims under various legal theories that the Court will discuss in turn.

1. Political Subdivision Tort Claims Act

Defendants argue that these claims are barred by the Pennsylvania Political Subdivision Tort Claims Act ("Tort Claims Act"), 42 Pa. Cons. Stat. § 8541. The Tort Claims Act exempts local agencies from liability for damages for any injuries caused by acts of the agency or its employees. 42 Pa. Cons. Stat. § 8541 (2000). Injured parties may recover in tort from a municipality only if (1) damages would be otherwise recoverable under common law or statute; (2) the injury was caused by the negligent act of the local agency or an employee acting within the scope of his official duties; and (3) the negligent act of the local agency falls within one of eight enumerated categories. 42 Pa. Cons. Stat. § 8542 (2000); Swartz v. Hilltown Township Volunteer Fire Co., 721 A.2d 819, 820-21 (Pa. Commw. Ct. 1998). The eight exceptions to the legislative grant of immunity are: (1) vehicle liability; (2) care, custody, or control of personal property; (3) care, custody, or control real property; (4) trees, traffic controls, and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody, or control of animals. 42 Pa. Cons. Stat. § 8542(b) (2000). A municipality may not be held liable for the willful or wanton misconduct of its employees. Verde v. City of Philadelphia, 862 F. Supp. 1329, 1336 (E.D. Pa. 1994) (citations omitted). Since Counts V through

[10]Count X for loss of consortium may not be maintained against Adams and the Pension Board since there are no state law claims directed at their actions. See Wiers v. Barnes, 925 F. Supp. 1079, 1095-96 (D. Del. 1996); Quitmeyer v. Southeastern Pa. Trans. Auth., 740 F. Supp. 363, 370 (E.D. Pa. 1990) (holding no authority to consider a loss of consortium claim deriving from a claim of injury by an injured spouse brought pursuant to 42 U.S.C. § 1983).

IX allege intentional tortious conduct, the Tort Claims Act immunizes from liability both the City and the City Council, assuming without deciding that the latter is an entity that is amenable to suit. Since Lessig's claim for loss of consortium derives solely from his spouse's right to recover in tort, the City and City Council are immune from liability on Count X as well. See Wakshul v. City of Philadelphia, 988 F. Supp. 585, 590 (E.D. Pa. 1997).

The Tort Claims Act further extends immunity from liability to officials acting within the scope of their duties to the same extent as the local agency, except for acts constituting a crime, actual fraud, actual malice or willful misconduct. 42 Pa. Cons. Stat. §§ 8545, 8550 (2000). Counts V through IX, read generously, arguably allege willful misconduct by Pena and Mayor Eppihimer, by stating that they knew that the method by which and reasons for which they terminated her violated the City Charter and they acted with the intent to harm her. (Am. Compl. ¶¶ 107, 114,118(b), (c), 123(b), 126, 126.) The Tort Claims Act thus provides no protection for Pena and Mayor Eppihimer.

2. Absolute Immunity

Mayor Eppihimer argues that he has absolute privilege against liability for Counts V through X. The doctrine of absolute privilege applies to mayors of municipalities. Lindner v. Mollan, 677 A.2d 1194, 1199 (1996). Although it originated in the context of a defamation case, Matson v. Margiotti, 88 A.2d 892, 895 (1952), the Court concludes that the doctrine of absolute privilege applies in cases alleging wrongful or retaliatory termination. A Pennsylvania court has applied the doctrine in a case alleging tortious interference with employment contract. Holt v. Northwest Pa. Training Partners Consortium, Inc., 692 A.2d 1134, 1140 (Pa. Commw. Ct. 1997). A court in this district has predicted that the Pennsylvania Supreme Court would apply common law absolute

immunity to tort claims other than defamation. Smith v. Sch. Dist. of Philadelphia, 112 F. Supp. 2d 417, 425-26 (E.D. Pa. 2000) (applying absolute privilege doctrine to claims for invasion of privacy and intentional infliction of emotional distress). The Smith court reached its prediction based on:

> the Lindner court's explanation that the Pennsylvania common law doctrine of absolute immunity for high public officials "rests upon the idea that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." Also significant is the Lindner court's statement that "this sweeping immunity is not for the benefit of high public officials, but for the benefit of the public."

Smith, 112 F. Supp. 2d at 426 (quoting Lindner v. Mollan, 677 A.2d 1194, 1195-96 (Pa. 1996)). The Lindner court explained that absolute immunity for high public officials from civil liability is the only legitimate "means of removing any inhibition which might deprive the public of the best service of its officers and agencies." Lindner, 677 A.2d at 1196. The Court agrees with the Smith court's conclusion that these concerns are relevant to many different tort claims other than defamation. Accordingly, the Court concludes that Mayor Eppihimer is protected from liability under Counts V through X.

3. Abstention

28 U.S.C. § 1367(a) permits the court to decline supplemental jurisdiction over a claim when it "raises a novel or complex issue of State law" or in other exceptional circumstances. Defendants argue that Counts V and VI, alleging violations of the City Charter, raise novel issues of state law that should be decided by a state court. The Court declines this request. Neither Counts V or VI raise sufficiently novel or complex issues to justify refraining from exercising supplemental

jurisdiction.

Defendants also seek abstention pursuant to the doctrine established in Burford v. Sun Oil Co., 319 U.S. 315 (1943). In Burford, the United States Supreme Court stated that a federal court should refuse to exercise its jurisdiction in a manner that would interfere with a state's efforts to regulate an area of law in which state interests predominate and in which adequate and timely state review of the regulatory scheme is available. See id. at 332-334. The United States Supreme Court has explained the Burford doctrine as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)). The purpose of Burford abstention has been articulated by this court as "to avoid federal intrusion into matters of local concern and which are within the special competence of local courts." Chiropractic Am. v. Lavecchia, 180 F.3d 99, 104 (3d Cir. 1999) (quoting Kentucky W. Va. Gas Co. v. Pa. Public Util. Comm'n, 791 F.2d 1111, 1115 (3d Cir.1986)).

To determine the propriety of Burford abstention, the federal court must first examine whether an adequate and timely state court review is available. Lavecchia, 180 F.3d at 104. If not, then the court must determine whether federal adjudication of the plaintiff's claims would interfere with the state's efforts to implement a regulatory policy. Id. at 105. This determination requires

examination of (1) whether the particular regulatory scheme involves a matter of substantial public concern, (2) whether it is the type of complex, technical regulatory scheme to which the Burford abstention doctrine usually is applied, and (3) whether federal review of a party's claims would interfere with the state's efforts to establish and maintain a coherent regulatory policy. Id. (citing New Orleans Public Serv., 491 U.S. at 361).

Burford abstention is inappropriate in this case. Assuming for the purposes of this motion that timely and adequate state court review is available, Plaintiff's claims do not involve the type of complex or technical regulatory scheme to which the Burford doctrine is normally applied. See e.g., Burford, 319 U.S. at 334 (abstaining from review of decision state agency regulating oil industry); Riley v. Simmons, 45 F.3d 764, 771 (3d Cir. 1995) (applying Burford to state's regulation of insurance companies); Lavecchia, 180 F.3d at 104 (approving abstention under Burford where case involved constitutional challenge to state's comprehensive no-fault automobile insurance law).

IV. CONCLUSION

Defendants' Motion is granted in part and denied in part. Counts I, III, and IV are dismissed against all Defendants. Count II as brought by Lessig is dismissed against all Defendants. Counts V through X are dismissed as against Mayor Eppihimer, the City of Reading, and the City Council. Ballas may proceed on Count II against the Mayor, the City, Pena, and the City Council, and Counts V through X against Jesus Pena. An appropriate Order follows.